

June 30, 2005

Karl H. Berger
City Attorney
City of Santa Paula
P.O. Box 569
Santa Paula, CA 93061

Re: Your Request for Advice
Our File No. A-05-054

Dear Mr. Berger:

This letter is in response to your request on behalf of various public officials of the City of Santa Paula for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Do Councilmembers John Procter and Gabino Aguirre and Planning Commission Members Michael Sommer and Gary Nasalroad have a conflict of interest preventing them from participating in any governmental decisions regarding the Fagan Canyon Project (“Project”) as a result of their interest in real property located within 500 feet of the boundaries of the Project?
2. Do any of the remaining councilmembers — Ray Luna, Mary Ann Krause, and Rick Cook have a conflict of interest preventing them from participating in any governmental decisions regarding the Fagan Canyon Project under the facts presented?
3. If one or more of these officials has a conflict of interest, would the “public generally” exception permit any official, nevertheless, to be involved in the governmental decisions?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSIONS

1. Councilmembers Procter and Aguirre and Commission Members Sommer and Nasalroad all own real property located within 500 feet of the boundaries of the proposed project, and the project is presumed to have a financial effect on each of these properties. Accordingly, each of the officials has a conflict of interest prohibiting them from making, participating in making, or influencing decisions relating to the approval of the Fagan County Project, unless an exception applies.

2. Councilmembers Krause, Cook and Luna all own properties that are located more than 500 feet from the boundaries of the proposed project. Accordingly, it is presumed that the governmental decision will not have a reasonably foreseeably material financial effect on their properties, and they do not have conflicts of interest.

3. The “public generally” exception applies if the financial effect of the governmental decision on a public official’s economic interest is indistinguishable from its effect on the public generally. If the financial effect on the individual public official’s real property economic interest is in substantially the same manner as its effect on ten-percent or more of the jurisdiction, the “public generally” exception applies.

Councilmember Procter: Councilmember Procter resides in a neighborhood where the average sales price of a home is approximately \$528,385. His residence is on a parcel of 19.27 acres. Because of the size of his property, Councilmember Procter’s property will not be affected in substantially the same manner as other real property owners, as further discussed below.

Planning Commissioners Nasalroad and Sommer: We do not have any information regarding these officials to determine if the exception applies. However, if the commissioners own single family residences of average size and value, they may be able to identify a significant segment that includes at least ten-percent of property owners in the jurisdiction that is similarly affected. If that is the case, they may participate in the decisions.

Councilmember Aguirre: Councilmember Aguirre owns a single family residence of average size. You have not provided information regarding the value of his property. If he is able to identify a significant segment that includes at least ten-percent of property owners in the jurisdiction and that is otherwise similarly affected as discussed below, he may participate in the decisions.

FACTS

This letter is a follow-up to our previous *Berger* Advice Letter, No. A-03-191. In that letter, regarding the Fagan Canyon Project, we advised that Councilmember John T.

Procter and Councilmember Gabino Aguirre² had a presumed conflict of interest in any governmental decisions regarding the Project because they owned property located within 500 feet of the boundaries of the Project.

We further advised that Councilmember Rick Cook did not have a presumed conflict of interest based on the location of his residence. However, the purchaser of his former residence, which was located within 500 feet of the project, was a source of income to him, and he would have a conflict of interest on this basis only if these decisions will have a material financial effect on the purchaser's assets or liabilities. (*Berger Advice Letter, supra.*)

Finally, we advised that Councilmembers Mary-Ann Krause and Ray Luna, whose properties were located more than 500 feet from the boundaries of the Project, were presumed not to have a conflict of interest and could participate in any of the proposed decisions on the Project, as long as the presumption was not rebutted by other factors such as substantial effects on traffic that would result in financial impacts on their properties from the increased traffic flow resulting from the development.

You indicate that the facts contained in our previous letter "are substantially unchanged."³ The facts in our previous letter are summarized as follows:

The City of Santa Paula (the "City") is a general law city with a city manager form of government, including a five-member city council and a seven-member planning commission. Santa Paula's jurisdictional boundaries encompass approximately 4.4 square miles (an area of approximately 2,908 acres), subdivided into 6,833 parcels owned by a total of 6,142 property owners. There are 3,643 owner-occupied residential units located in the city. Santa Paula has a population of 28,598, averaging 3.49 persons per household.

Highway 126, which bisects the City near its southern boundary, is the only regional transportation route into or out of Santa Paula. Santa Paula's commercial center is roughly parallel to, and several blocks north of, Highway 126. Access to Santa Paula's commercial center and to Highway 126 is gained through seven major traffic corridors: Ojai Road/Highway 150, 10th Street/Highway 150, Palm Avenue, Peck Road, Santa Paula Street, Main Street, and Harvard Boulevard/Telegraph Road.

A developer is proposing to develop an area of approximately 2,000 acres situated immediately adjacent to Santa Paula's northern boundary, known as the Fagan Canyon Project" or "Project." Fagan Canyon is currently undeveloped mountainous terrain. Because of this topography, development within the overall project area can only occur

² Mayor Procter and Vice-Major Aguirre in our first letter. Because the titles have since changed, and for the sake of simplicity, this letter will refer to each of the members of the city council as "Councilmember."

³ One fact that appears to have changed relates to Councilmember Cook. Since a source of income economic interest, by definition, includes only payments made within the previous 12-month period, and it has been more than a year since the sale of Councilmember's Cook's residence, he no longer has an economic interest in the purchaser as a source of income to him. (Section 87103(c), reg. 18703.3.)

within a limited area, generally adjacent to Santa Paula's existing boundaries. There are 416 parcels of City real estate located within 500 feet of the boundaries of the Project. City records also show that 283 property owners (approximately 4.6% of the city's total number of property owners) reside within 500 feet of the proposed boundaries of the Fagan Canyon Project. The Project consists of between 1,350 and 2,500 residential dwelling units, parks, recreational areas, and other public and private improvements. The developer proposes that the city annex Fagan Canyon, which would increase the City's area by approximately 75% and, if all 2,500 residential dwelling units are built, increase the City's population by up to 10,000 (a 35% population increase).

Commuting traffic, and traffic from outlying areas to the city's center, presently travels through one or more of the seven existing traffic corridors. The Fagan Canyon Project would not lead to a relocation of any of these corridors. Instead, although the topography limits ingress to and egress from Fagan Canyon to four access points, the traffic generated by the Project's residents will flow through one or more of the seven existing traffic corridors. It is expected that the increased traffic through some of these corridors will be substantial (as much as 30% on one corridor and 52% on another). City traffic engineers have projected traffic flows from the Project and conclude that it is probable that all of the city's residents will be affected in their vehicular travel, regardless of their distance from the Project boundaries.

Numerous governmental approvals will be required to develop the Project. At present, the developer has only filed for city approval of a general plan amendment, the pre-annexation agreement, and the reimbursement agreement. These two agreements, if approved by the City, would establish procedures for further planning and create a mechanism to reimburse the city for its related planning costs. The general plan amendment is to increase the number of homes permitted in development of Fagan Canyon from the presently authorized 455 to the developer's planned number, which is 2,500.

As noted in our previous letter, Mayor Procter's principal residence is owned by an irrevocable living trust, in which he has a one-eighth interest. He pays no rent, although the fair market rental value may be close to \$2,000 per month. Vice Mayor Aguirre owns his principal residence, which has a fair market value that exceeds \$2,000. These properties are located within 500 feet of the boundaries of the Fagan Canyon Project. Councilmember Cook also owns his principal residence, which has a fair market value that is more than \$2,000 and is located more than 500 feet from the Project boundaries. Councilmembers Krause and Luna each own homes, which are located more than 500 feet from the Project boundaries. Each of their homes is valued in excess of \$2,000.

With some exceptions, the facts summarized above are equally applicable to this letter. In your prior request, you stated that Councilmember Krause's property was within 500 feet of a traffic corridor. The Brion Study mentioned below states that her property is not within 500 feet. Therefore, we presume this fact has changed. As to Councilmember Cook, he no longer has an economic interest in a source of potentially

disqualifying income. In addition, you indicate in the current letter that Planning Commission Chairperson Michael E. Sommer and Commissioner Gary L. Nasalroad also own residences located within 500 feet of the project boundaries. You acknowledge that based on the analysis provided in our previous letter, both Chairperson Sommer and Commissioner Nasalroad also have presumed conflicts of interest in any governmental decision regarding the project. You have stated that neither has participated in the Project's decision-making process and, in a telephone conversation, that no further governmental action has occurred since our previous letter.

Our previous letter advised that under the "public generally" exception, a public official who otherwise has a conflict of interest in a decision may still participate if he or she meets the requirements under that exception. You have now provided additional information and are requesting further advice as to our conflict of interest analysis and as to whether or not the "public generally" exception applies if there are any conflicts. The additional facts provided, as contained in several studies, are:

The Brion Study

On or about November 10, 2004, the City received an economic analysis of the Project (dated June 29, 2004) prepared by Brion & Associates on behalf of Centex Homes ("Brion Study"). You have provided a copy of that study. The Brion Study focused on the Project's traffic impacts within the City and the effect of those impacts on the property interests of the City's residents. The Brion Study draws a number of conclusions and provides additional facts relevant to the City officials' potential conflicts of interest pertaining to the Project.

The study examined the potential impact on the traffic corridors, and the resulting noise impact, and traffic impact, on properties located within the corridors. It found that Councilmembers Cook's and Krause's properties are located outside any of the traffic corridors, and, therefore, their properties will be unaffected. However, Councilmembers Aguirre, Procter, and Luna all own property within one of the traffic corridors. As a result, their properties will be affected.

Traffic Corridors – Noise and Traffic Impacts:

Noise: The Brion Study identifies seven traffic corridors that may be impacted by the project. With respect to the potential impact from traffic noise, it divides these seven areas into two distinct subgroups: (1) Noise impact subarea N-1 (higher impact corridors); and (2) Noise impact subarea N-2 (lower impact corridors). According to the study, Councilmembers Aguirre, Procter, and Luna reside within subarea N-2, as do 33% of homeowners in the City.

The Brion Study concludes that "[n]one of the Councilmembers would experience a potential price impact from changes in noise generated by traffic, as the threshold for a

price impact is not reached in the corridors in which they live,” the N-2 subarea.⁴ The only price impact from noise would be experienced in noise subarea N-1.⁵

The median sales price of single-family homes in the corridor areas between September 2003 and January 2004 was \$360,000. None of the councilmembers live in Noise Impact Subarea N-1, which is the higher impact area and which is expected to have a potential price impact of negative 1% or \$3,500 per unit (pp. 6 and 29). Accordingly, none of the councilmembers’ real properties are expected to experience a change in their property value due to noise impact.

Traffic: For the purpose of analyzing the effect from increased traffic along the seven traffic corridors, the Brion Study again divides the seven corridors into two distinct subgroups: (1) Traffic impact subarea T-1 (higher impact corridors); and (2) Traffic impact subarea T-2 (lower impact corridors). The Brion Study concludes that:

- Approximately 34 percent of residential property owners in the City own homes in Traffic Impact Subarea T-1 and may experience negative price impacts from an increase in traffic. The increase in average daily trips in this group would average to about 3,600 trips. The study concluded that this would result in a potential negative impact on single-family homes located in this subarea. The average decrease in price as a result of increased traffic would be approximately two percent per unit on average or - \$7,085 per unit (pp 6 and 32). This group of owners includes Councilmembers Aguirre and Procter.
- Approximately 30 percent of residential property owners in the City own homes in Traffic Impact Subarea T-2 and may experience negative price impacts from an increase in traffic. The study states that the estimated average negative impact is estimated to be negative .6%⁶ or - \$2,200 per unit⁷ (p. 32). This group of owners includes Councilmember Luna.

The study also states that other factors can result in positive impacts on property values. These effects will be experienced by all property owners throughout the City. These include increased retail demand for existing retailers, new sales tax revenue to the City, new funding for community facilities, and new General Fund revenues.

⁴ For each one dBA increase in noise, the study states that it is assumed that sales prices will decline by 0.4 percent (less than one percent). In the case that noise impacts are below one dBA, the price impact is assumed to be zero (p. 5).

⁵ The BTI Peer Review, while questioning the Brion Study with respect to certain aspects of its noise findings relative to subarea N-1, nevertheless, concurs with the Brion Study’s finding regarding no impact from noise in subarea N-2.

⁶ On page 6 of the study, this percentage is expressed as 1.2%.

⁷ In a footnote, the study indicates that the average price impact from an increase in traffic summed across all seven corridors is approximately \$4,300 (p. 32).

BTI Study

After receiving the Brion Study, the City retained its own consultant (“BTI Appraisal”) to prepare a peer review of the Brion Study and an independent analysis of the project’s potential impacts on the property interests of Councilmembers Procter and Aguirre. You have also provided a copy of the final study presented to the City (“BTI Study”) and the peer review of the Brion Study by BTI Appraisal (“BTI Peer Review”).

The BTI Study reviewed the Project’s impact on the City of Santa Paula and the above councilmembers’ properties. It also examined the potential effects of traffic and noise, and whether the proposed changes to parks and trails, schools, police and fire services might have an impact on the councilmembers’ property interests. Additionally, the BTI Study considered whether properties located in a lower priced neighborhood (i.e., the councilmembers’ properties) would increase in value if located in a higher-priced neighborhood (i.e., the Project’s neighborhoods), a concept identified as the “principle of progression.”

Pertinent facts include that Councilmember Aguirre owns a single family residence on a 14,556 square foot parcel. Councilmember Procter’s property includes a single family residence on a 19.27 acre site. The site’s current characteristics make it adequate for development. As to various assessments, the BTI Study concludes that neither of the subject properties (referring to Councilmembers Aguirre and Procter) will be affected by a sewer study, water system study, environmental site assessment, and hydrology study. The replacement of an existing water line will result in construction that will affect the subject properties during construction, as it will affect other properties. A new fire station could impact property values, as well as the construction of new schools and community facilities such as parks. The study finds that the councilmembers’ properties will not be financially impacted based on these improvements.

The BTI study also states that based on recent sales data (March 2005), the average sale price of homes near Councilmembers Aguirre and Procter was \$528,395, as opposed to an average sales price of \$463,065 throughout the city. (BTI Study, p. 33.) Finally, the study finds that based on “the principle of progression” Councilmember Aguirre’s and Procter’s homes will not be affected by the Project “due to the proximity” to the Project.

BTI Peer Review

The BTI Peer review of the Brion Study states that the study does not address relative changes in value due to the overlay of Fagan Canyon traffic and noise added to existing levels of traffic and noise along the defined corridors. For example an existing 500 traffic count increase, by itself would not cause a value impact, but adding this to an existing 500 count would cause an impact. Also, the Study does not address the impact of combined traffic which, in some cases, could reach level of traffic or noise which, in combination, could affect values. However, the BTI Peer Review concludes that “the

analysis, opinions and conclusions contained in the [Brion] Study are adequate, reasonable and reliable.” (p. 9.)

ANALYSIS

The Act’s conflict of interest provisions ensure that public officials will “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) Since the *Berger* letter, *supra*, provided a review of this eight-step process, we need not reexamine each of those preliminary steps here, but, rather, examine whether the additional facts you have provided change our previous advice. You have also provided additional facts regarding the potential applicability of the “public generally” exception. We will, therefore, provide a further analysis under step seven – the “public generally” exception.

Potential Conflicts of Interest:

To review from our last letter, each of the councilmembers has an economic interest in the real property on which their principal residence is located. Based on the facts originally presented in *Berger, supra*, we advised that Councilmembers Procter and Aguirre were presumed to have conflicts of interest since their residences are located within 500 feet of the Project’s boundaries. Because Councilmembers Krause’s and Luna’s property were located more than 500 feet from the proposed boundaries of the Project, they were presumed not to have a conflict of interest.

With respect to Councilmember Cook, his residence was also located more than 500 feet from the boundaries, so he was also presumed not to have a conflict of interest based on his residence. His presumed conflict of interest as identified in that letter was based on an economic interest that no longer exists.

Your current letter indicates, additionally, that two members of the planning commission, Chairperson Sommer and Commissioner Nasalroad also own properties within 500 feet of the proposed boundaries of the Project. For the reasons analyzed in our previous letter, they too are each presumed to have a conflict of interest in the governmental decisions concerning the Project. Accordingly, there are now two councilmembers (Procter and Aguirre) and two planning commissioners who are presumed to have conflicts of interest because they own property located within 500 feet of the proposed boundaries of the Project. (Regulation 18705.2(a).) The remaining three councilmembers (Cook, Krause, and Luna) are presumed not to have a conflict of interest, since their properties were all located more than 500 feet from the proposed boundaries of the Project. (Regulation 18705.2(b).)

In our previous letter we also cautioned that there may be other impacts from the Project that will need to be considered in any conflict of interest analysis, particularly the financial effects on real property resulting from the increased traffic flow caused by the Project, especially on those properties located near the traffic corridors that are impacted. We stated that “it is possible that the presumption of no reasonable material financial with respect to ... economic interest in real property may be rebutted by the Project’s impact on traffic flow.” (*Berger, supra.*)

You have now submitted several studies that attempt to measure the various financial effects on properties within the City, as a result of the Project, including the residential properties of Councilmembers Procter and Aguirre, as well as the financial effects on all properties affected by the increased traffic flow. Consequently, we will discuss the finding of these studies as they relate to our further analysis of any potential conflicts of interest and the application of the “public generally” exception for each of the officials who are presumed to have a conflict of interest.

Properties Located Within 500 Feet of Boundaries (Councilmembers Aguirre and Procter and Commissioners Sommers and Nasalroad):

Councilmembers Aguirre and Procter are presumed to have a conflict of interest because their residences are within 500 feet of the Project. They may rebut this presumption of materiality if they can show there will be “no” financial effect on their real property interests. (Regulation 18705.2(a)(1).)

The BTI Study attempts to measure the impact of the Project on the residences of Councilmembers Procter and Aguirre, apparently in response to the conclusion in our first letter that their properties were presumed to be materially financial effected because of their location within 500 feet of the boundaries of the Project.⁸ Its findings purport to offer evidence that there will be no financial effect on these properties as a result of their proximity to the Project, based on findings in a research article published in a trade journal (the “JRER Study”).⁹

The BTI Study, entitled “The Impact of the Proposed Fagan Canyon Development on the Residences of Councilmember Gabino Aguirre and Councilmember John Procter,” in part, extrapolates findings from the JRER Study conducted in Cleveland, Ohio that attempts to establish a measurable distance regarding the effects of the principle of

⁸ The study does not include any analysis of the impact of the Project on the residences of Commission Members Sommer and Nasalroad, whose properties are also located within 500 feet of the Project.

⁹ “*The Effect of Residential Investment on Nearby Property Values: Evidence from Cleveland, Ohio,*” Journal of Real Estate Research, Vol.19 No. ½ - 2000. The BTI Study applies the JRER study’s conclusion that new construction has no impact on property values beyond 300 feet away, based on the journal article’s finding, relative to a particular location, that the value of properties located beyond 300 feet from the new development studied was unaffected by the new development. However, the study concludes that “[i]t should be noted that our research findings pertain only to Cleveland and they cannot be generalized in other housing markets.” (JRER Study, p. 44.)

progression¹⁰ on lower-priced neighborhoods resulting from the nearby construction of residential development of higher-priced homes. The JRER Study concludes that “[v]arious tests in this study suggest that new construction has no impact on property values beyond 300 feet away ...”

However, since the JRER Study specifically states that the findings are only applicable to the location examined, Cleveland, Ohio, it may not be relied upon as the sole basis for the public officials to determine the financial effects on the properties located within 500 feet of the Project herein. While the findings and conclusion in the reports may be accurate, it is the duty of the public official to determine the particular financial effects on his or her economic interests. Public officials must make a good faith effort to evaluate all relevant facts applicable to governmental decisions.

It should also be noted that even if there are sufficient facts to conclude that there is no financial effect (not even a penny) on any of the properties that are within 500 feet of the Project’s boundaries, as a result of their proximity, the presumption of material financial effect would still not be rebutted if there are financial effects due to other factors (traffic corridors and the City as a whole). For example, the studies indicate that there will be a number of benefits from the Project that will be shared equally by all residents of Santa Paula and property values may increase as a result of these benefits. The BTI Study further indicates that “any anticipated increase in property values would be expected to affect all residential property owners in substantially the same manner.” (p.19.) If, in fact, it is reasonably foreseeable that property values in all of Santa Paula would increase as a result of any specific governmental decision concerning the Project, this increase would amount to a material financial effect on Councilmembers Procter and Aguirre and the two planning commissioners mentioned herein, since they all own property in the City and within 500 feet of the Project. Therefore, they each may have a conflict of interest on the basis of the one-penny rule.

Specifically, with respect to Councilmember Aguirre’s and Councilmember Procter’s property, as stated above, the facts show that there will be some financial effect on their properties because all city property owners will experience a general increase in the value of their property. Both the BTI Study and the Brion Study draw specific conclusions with respect to the Project’s impact on property values for all City residents, resulting from such factors as: increased revenue to the City from building and development fees, increased property and sales tax base, greater levels of commerce, better parks, schools, and city services and positive benefits on all residents from increased property values. Thus, your facts do not support a conclusion that the presumption of materiality as to public officials who reside within 500 feet of the Project boundary is rebutted. (Regulation 18705.2.)

Accordingly, Councilmembers Procter and Aguirre and Commission Members Sommer and Nasalroad each have a conflict of interest. Unless an exception applies,

¹⁰ As stated in *The Appraisal of Real Estate*, Eleventh Edition, by the Appraisal Institute of Chicago, Illinois, “according to the principal of progression, a lower-priced property will be worth more in a high-priced neighborhood than it would in a neighborhood of comparable properties.”

these officials¹¹ are prohibited from participating in any governmental decisions concerning the Project.

Councilmembers Krause, Cook and Luna:

Councilmembers Krause and Cook own homes beyond 500 feet of the Project. Councilmember Luna's property is also beyond 500 feet of the Project but within one of the affected traffic corridors. As a result, unlike Councilmembers Krause and Cook, his property will experience some traffic impacts (T-2).

These officials are presumed to not be materially affected unless specific circumstances exist making it reasonably foreseeable that the decision will have a material financial effect on the real property.¹²

The following nonexclusive list of specific circumstances may be considered to determine if it is reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest: Effects on (A) the development potential or income producing potential of the real property in which the official has an economic interest; (B) the use of the real property in which the official has an economic interest; and (C) the character of the neighborhood, including, but not limited to, substantial effects on traffic, view, privacy, intensity of use, noise level, air emission, or similar traits of the neighborhood. (Regulation 18705.2(b)(1).)

When the Commission adopted the latest changes to regulation 18705.2(b)(1), the clear intent was not to preclude participation by officials with real property interests beyond 500 feet from the boundaries of the subject of the governmental decision unless there are significant factors to compel such a result.¹³

The Brion Study indicates that Councilmember Krause's and Councilmember Cook's properties will not be financially affected from either noise or traffic since their properties are not within any of the Noise Impact or Traffic Impact areas. The facts show that there will be some financial effect on their properties because all city residents will experience a general increase in property values. However, we would not consider these general citywide impacts alone as creating "specific circumstances" for purposes of rebutting the presumption under regulation 18705.2. Therefore, under the facts presented, the presumption of nonmateriality is not rebutted, and these officials are presumed not to have conflict of interest in participating in the governmental decisions.

¹¹ Other than the fact that Commissioner Sommers' and Nasalroad's properties are located within 500 feet of the proposed boundaries of the Project, you have not provided any additional facts concerning the potential financial impacts on these properties, separate from those affecting all residents.

¹² With respect to these properties, the "one penny rule" does not apply.

¹³ Chairman Getman commented that "[b]eyond the 500 foot range, participation would be allowed unless something about the decision makes the official's property 'stick out like a sore thumb.'" (Commission minutes, October 6, 2000, p. 4.) In other words, in order to rebut the presumption of nonmateriality, the affect of the governmental decision must result in a clearly distinguishable and substantial financial effect on the official's real property.

As to Councilmember Luna, under the facts presented, his property will be financially affected by its location within one of the traffic corridors, in addition to the overall financial effect experienced by all real property within the City. Since effects on traffic are one of the factors that will be considered as specific circumstances under regulation 18705.2(b)(1)(C), it appears that factors exist as to this official that may rebut the presumption that the governmental decisions will not have a material financial effect on his property. However, the mere existence of a factor is insufficient to rebut the presumption; rather, the factor must demonstrate that it is reasonable foreseeable that the property will, in fact, be materially affected. For example, for purposes of regulation 18705.2(b)(1)(C), in examining what constitutes a “substantial” effect, in the *Randolph* Advice Letter, No. A-01-109, where the facts indicated that “[t]he traffic may increase by 15% on feeder streets surrounding [the official’s home]” we concluded that those effects were not “substantial.”¹⁴

It does not appear that the facts rebut the presumption of nonmateriality, and Councilmember Luna is therefore presumed not to have a conflict of interest.¹⁵

STEP 7: THE “PUBLIC GENERALLY” EXCEPTION

Even if a public official determines that his or her economic interest will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally. (Section 87103, regulations 18707.)

Regulation 18707 (b) sets forth a four-step process to determine “if the effect of a decision is not distinguishable from the effect on the public generally:”

(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

(2) Step Two: For each person or real property identified in Step One, determine the applicable “significant segment” rule according to the provisions of [Regulation 18707.1(b)].

¹⁴ We note that under the facts provided in your first request, you stated that, “[i]t is expected that the increased traffic through some of these corridors will be substantial (as much as 30% on one corridor and 52% on another).” However, the facts indicated herein suggest that Councilmember Luna’s property will be expected to experience only a one-percent negative financial effect. No specific facts are given as to the actual affect on Councilmember Luna’s property, for example, whether or not his property is located on one of the feeder streets or how his property will be impacted in relation to other properties within the impacted traffic corridors. For purposes of this analysis, we find only that the one-percent decrease is not substantial under the Act. Again, the Commission does not act as the finder of fact

¹⁵ See also *Jex* Advice Letter, No. A-05-023, where, under the facts presented, we concluded that the effects from increased traffic were substantial.

(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable 'significant segment' rule. If the answer is 'no,' then the analysis ends because the first prong of a two-part test set forth in [Regulation 18707.1(b) is not met, and the public official cannot participate in the governmental decision. If the answer is 'yes,' proceed to Step Four.

(4) Step Four: Following the provisions of [Regulation 18707.1(b)(2), determine if the person or real property identified in Step One is affected by the governmental decision in "substantially the same manner" as other persons or real property in the applicable significant segment. If the answer is "yes" as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is "no" as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in [Regulations 18707.2 through 18707.9] applies to each person or real property triggering the conflict of interest." (Regulation 18707(b)(1-4).)

Application of the Four-Pronged Test

Step One: The real property interests of Councilmembers Procter, and Aguirre and Commission Members Sommer and Nasalroad will be materially affected by the governmental decision.

Step Two: The applicable "significant segment" for real property economic interests under regulation 18707.1(b)(1)(B) is "[t]en percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents" or "5,000 property owners or homeowners in the jurisdiction of the official's agency."

Step Three: Under the facts presented, a significant segment of the public includes all property owners in the City itself because your facts indicate that all (100 percent) of the homeowners within the jurisdiction will be financial effected by the governmental decisions. Therefore, you have met the ten percent threshold necessary for this prong on that basis alone. However, the public officials will need to consider all the

various financial effects¹⁶ in determining the “substantially the same manner” test set forth in step four.¹⁷

Step Four: The final step requires the official to determine the financial effects on his or her real property interest and measure these financial effects against the financial effects on other real property in the significant segment that is used by the official to determine if the properties are affected in “substantially the same manner” as his or her own property.

Under the facts you have presented, you have identified a significant segment of the public with respect to the governmental decisions in question. However, what becomes critical for each official is identification of at least ten percent of the homeowners within that segment that are impacted in substantially the same manner. In other words, while you state all the property owners in the City will be affected by the governmental decisions, it does not establish that the overall financial effect is substantially similar to at least ten percent of all other property owners in the segment under the Political Reform Act and the applicable regulations.¹⁸

Councilmember Procter: Given the facts you have presented, Councilmember Procter may participate in the decisions only if there is a significant segment of the public that is similarly impacted by the governmental decisions as the councilmember. Ordinarily, because a public official owning a large amount of acreage will experience a larger financial effect as a result of the decision than a property owner with a much smaller amount of land will experience, homeowners that own parcels of a similar size and value would be the only ones similarly affected as the councilmember. Consequently, Councilmember Procter, whose property consists of 19.27 acres, would have to use comparable sized parcels to assess substantially similar financial effects.

Because Councilmember Procter’s property consists of 19.27 acres in a neighborhood that consists of single-family residences with an average price value of \$528,385, due to the size of his property, the property value of Councilmember Procter’s residence is unlikely to be similar to other properties in the City. It is, therefore, equally

¹⁶ For example, factors that could result in financial effects on properties in the identified segment could include effects resulting from the proximity of the property to the Project or other property that is the subject of the decision, location of the property, impact from noise and traffic, impact due to development potential, size of the property, etc.

¹⁷ In the *Doi* Advice Letter, No. I-04-076, we stated that “[w]ith regard to determining the financial effect of a decision, we have advised that, because the Commission is not a finder of fact, the official must make a good faith effort to assess the effect of the decision by using some reasonable and objective methods of valuation. (*Moock* Advice Letter, No. A-01-150.) Such a good faith effort may require that additional information regarding the potential financial effect of the decision be gathered; a public official is not required to but may choose to utilize professional services, such as those of a professional apprais[er], to assist in assessing the financial effect of a decision for conflict-of-interest purposes. (*Ho* Advice Letter, No. A-00-241.)”

¹⁸ For purposes of the general “public generally” exception, regulation 18707.1, financial effects are measured in terms of actual financial impact. For example, a ten percent increase in value would not necessarily affect all properties in substantially the same manner. Higher value property would achieve a higher dollar value increase than lower value properties.

unlikely that the financial impact on his property resulting from the Project will be substantially the same as on property owners in the jurisdiction. Therefore, we conclude that he will not meet the "public generally" exception. (*Sansome* Advice Letter, No. I-03-058; see also *Zaltsman* Advice Letter, No. A-93-484, concluding that the "public generally" exception does not apply to a zoning decision where the requisite number of property owners do not own similar sized land holdings as public official).

Planning Commissioners Nasalroad and Sommer: We do not have any information regarding these officials to apply the exception. However, if the commissioners own single family residences of average size and value, they may be able to identify a significant segment that includes at least ten-percent of property owners in the jurisdiction that are similarly affected. If this is the case, they may participate in the decisions. In order to assist in this determination, you may follow the guidance we have provided below with respect to Councilmember Aguirre's property.

Councilmember Aguirre: Councilmember Aguirre owns a single family residence of average size and value. His property is located, along with 34 percent of homeowners in the jurisdiction, in the T-1 traffic impact area. Thus, there are three potential impacts on his property: 1) All properties in the T-1 traffic impact area are expected to experience a two-percent decrease in value; 2) The studies assume an overall positive impact affecting all City homeowners; 3) Councilmember Aguirre's property itself may experience additional impacts due to its proximity to the Project or from other factors; at this time, however, you have not given us any facts showing evidence of any specific impact to Councilmember Aguirre's property from those factors, so we will not consider any such impacts in this discussion. We have not been presented with enough facts to establish the overall financial effects of these potential impacts. However, for purposes of illustrating how to apply the "public generally" test, we will provide a hypothetical.

Let us assume that the current value of Councilmember Aguirre's property is \$500,000. The Brion study indicates that there will be a two-percent decrease in property value from traffic impacts. This is the Number 1) impact indicated above. The Number 2) impact is the overall positive impact affecting all property owners. For the sake of the hypothetical, let us assume that this overall positive impact is five-percent. Applying these assumptions, a negative two-percent impact plus a positive five-percent impact leaves a net impact of three-percent. For a \$500,000 home, the overall financial effect would thus be \$15,000.

As compared to the Councilmember's residence, for purposes of this letter, we conclude that the financial effect on properties in the segment could vary by a range of plus or minus two-percent of the value of the Councilmember's property (in this example, \$10,000 or a range between \$5,000 and \$25,000) and still be considered to be affected in "substantially the same manner" as the official's property.

In other words, Councilmember Aguirre would then need to establish that the financial effect on ten-percent of the jurisdiction is in the range between \$5,000 and

\$25,000 for the public generally exception to apply. He could first attempt to measure this by looking at the segment of homeowners within the T-1 area and, assuming the financial effects on these homeowners are equal to the three-percent increase in our hypothetical, he would need to show that a segment equal to 10-percent of the jurisdiction owned homes where the financial effect on those properties is between \$5,000 and \$25,000.

If Councilmember Aguirre could not meet the ten-percent requirement using the T-1 segment, once he has identified the dollar amount of the financial effect on his economic interest, he can add to the segment by looking at the group of homeowners affected by the overall value increases applied to the entire city, or any other segment he can identify, in order to determine if there are homeowners in that group whose overall financial effects are substantially the same.

We trust that this provides you the necessary guidance for you to apply the “public generally” exception of regulation 18707.1. Without more facts regarding the value of Councilmember Aguirre’s property and actual financial impacts resulting from decisions involving the Project, we are unable to further analyze the exception. Should you provide those facts, we can further assist you in applying the “public generally” rule of regulation 18707.1 to the councilmember.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: William J. Lenkeit
Counsel, Legal Division

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